IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

(HELD AT BLOEMFONTEIN)

SCA CASE NUMBER:_____/2019

GAUTENG DIVISION, PRETORIA CASE NUMBER: **34523/2017**

In the matter between:

AFRIBUSINESS NPC Applicant

and

THE MINISTER OF FINANCE Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

ARMAND GIDEON GREYLING

do hereby make oath and state:

1.

1.1. I am an adult male, employed as a Legal Practitioner with the Applicant, with place of employment situated at 117 Gerhard street, Die Hoewes, Centurion, Gauteng. In my capacity as such I am duly authorised to depose to this Affidavit on behalf of the Applicant.

1.2. The facts herein referred to fall within my own personal knowledge, except where otherwise indicated, and are true and correct.

THE PARTIES

2.

2.1. The Applicant is **AFRIBUSINESS NPC**, now known as SAKELIGA, a non-profit organisation duly incorporated in terms of the relevant legislation of the Republic of South Africa, with registration number: 2005/042861/08, and authorised by its Constitution to acquire, own and dispose of property apart from its members and to take, or defend itself against, legal action, with its main place of business situated at 117 Gerhard street, Die Hoewes, Centurion, Gauteng. I mention that Applicant changed its name to "*SAKELIGA*" NPC, to prevent *inter alia* any confusion which may arise relating to a totally separate entity, AfriForum.

2.2. The Applicant relied upon *locus standi* to bring a review application in the Court *a quo* in terms of Section 38 of the Constitution of the Republic of South Africa, Act No 108 of 1996, because Applicant acts as an Association in the interests of its members, in the public interest, and in the interest of a group of persons. Applicant's *locus standi* to apply for the relief set out in the Notice of Motion *a quo*, was not disputed, and it appears from the judgment of the Court *a quo* that Applicant's *locus standi* was confirmed.

2.3. Notwithstanding the aforegoing the deponent of the Answering Affidavit in the Court *a quo* attempted to discredit Applicant by referring to it as "*the progeny of AfriForum, which in turn is the progeny of Solidarity*" and further by insinuating that Applicant attempts to advance "*narrow parochial or racially-based interests*" with a "*political agenda, with hidden intentions and objectives*". It was further alleged that Applicant represents entities "*which choose to ignore the legitimate national imperatives affording opportunities to black people, woman, disabled people and small businesses*". The above averments and insinuations were with respect uncalled for, and for purposes of clarity I specifically mention that Applicant is a non-profit company established by senior business people to act as a business-rights watchdog, under circumstances when the business community in South Africa was and has been exposed to a series of diverse political, social and economic policies. Applicant supports constitutional imperatives and values, but believes that organised communities can and must play an active and changing role in the country. Applicant aims to mobilise business people in a positive manner to ensure a healthy business environment. A successful business environment needs a steady, fair and predictable environment. Membership of Applicant is not limited to the Afrikaans community or to any specific race.

3.

3.1. The Respondent is **THE MINISTER OF FINANCE**, cited herein in his representative capacity as the responsible person for the National Treasury

and the representative of Government relating to the Preferential Procurement Policy contemplated in Section 217 of the Constitution, with offices situated at 2nd Floor, Old Reserve Bank Building, 40 Church Street, Pretoria, Gauteng, *alternatively* c/o State Attorney, Manaka Heights, 8th Floor, 167 Thabo Sehume Street, Pretoria, Gauteng.

3.2. The Minister of Finance is at the heart of South Africa's economic and fiscal policy development. He should aim to advance economic growth and development, and to strengthen South Africa's democracy.

PURPOSE OF APPLICATION:

4.

4.1. This is an application to obtain leave to appeal in terms of Section 17(2)(b) of the Superior Courts Act, Act No 10 of 2013 against the judgment of the Honourable Judge Francis handed down on 28 November 2018 in the Gauteng Division, Pretoria, of the High Court of South Africa under case number 34523/2017, in terms of which an application for the review and setting aside of the Preferential Procurement Regulations 2017 ("*2017 Regulations*"), adopted and promulgated by Respondent, and published in the Gazette on 20 January 2017, was dismissed, with costs. A copy of the judgment is annexed hereto as **ANNEXURE "A1"**.

4.2. The application in the Court *a quo* was launched within the required 180 days after 20 January 2017 provided for in Section 7(1) of the Promotion of

Administrative Justice Act, Act No 3 of 2000 ("*PAJA*"), and although Heads of Argument had been filed by Respondent on 15 December 2017, 14 and 15 June 2018 were allocated for the hearing of the application by the Registrar of the Gauteng Provincial Division, Pretoria, on 20 February 2018. After argument judgment was reserved and thereafter handed down on 28 November 2018. Due to the program of the Honourable Judge in the Court *a quo*, an application for leave to appeal the judgment could only be heard on 26 June 2019, which application for leave to appeal was dismissed with costs on 27 June 2019, as appears from a copy of the judgment and order attached hereto as **ANNEXURE "A2"**.

4.3. The application was instituted in the Court *a quo* primarily upon the basis that Respondent acted *ultra vires* of the powers conferred upon him by the Preferential Procurement Policy Framework Act, Act No 5 of 2000 ("*PPPFA*"), read with Section 217 of the Constitution. Applicant further contended that the allowance by Respondent of the minimum period prescribed for public comment to the draft 2017 Regulations initially, and the effective extension of three further weeks, rendered the procedure followed by Respondent unreasonable and unfair. Finally Applicant contended that the adoption of the 2017 Regulations was irrational, unfair and unreasonable because:

4.3.1. no socio-economic impact assessment was done before adoption of the Regulations;

4.3.2. Respondent adopted the 2017 Regulations to further the objectives of the Broad-Based Black Economic Empowerment Act, Act No 53 of 2003 ("*the B-BBEE Act*"), although those objectives are not part of the five basic principles stipulated for procurement by Section 217(1) of the Constitution; and

4.3.3. the role to be fulfilled by functionality (ability) of a tenderer in terms of the 2017 Regulations was understated

4.4. Consequently Applicant contended that the promulgation and adoption of the 2017 Regulations had to be reviewed and set aside upon the grounds mentioned in Section 6(2)(a)(i), Section 6(2)(b), Section 6(2)(c), Section 6(2)(d), Section 6(2)(e)(i), Section 6(2)(e)(vi), Section 6(2)(f)(i) and (ii) and Section 6(2)(h) of PAJA.

4.5. The above contentions, as appears from **ANNEXURE "A1"**, were rejected by the Court *a quo*. The Court *a quo* in particular judged that Section 2 of the PPPFA posits an enquiry that takes place in three stages (paragraphs 50 and 73). As was pointed out in argument, also for leave to appeal, this finding is direct in conflict with two previous findings of High Courts, that Section 2 posits a two-stage enquiry. The Court *a quo* was referred to the matters of **Grinaker LTA Ltd v Tender Board (Mpumalanga), [2002] 3 ALL SA 336 (T),** paragraphs 56, 59, 60 and 62 and to **Rainbow Civils CC v Minister of Transport & Public Works, WC [2013] ZAWCHC 3** (6

February 2013), paragraph 111. The Court *a quo* further presumably found that pre-qualification criteria relating to the previously disadvantaged status of tenderers are permitted as objective criteria in terms of Section 2(f) of the PPPFA (paragraph 67), which finding is similarly in conflict with various authorities to which the Court *a quo* was referred.

4.6. The Court *a quo* rejected the contentions on behalf of Applicant, and refused leave to appeal against its judgment. It is submitted, in view of the exposition hereinlater, that an appeal will have a reasonable prospect of success, and due to conflicting judgments with pertinent findings of the Court *a quo*, and in the interests of justice, there are compelling reasons why an appeal should be heard.

THE LEGISLATIVE FRAMEWORK:

5.

The 2017 Regulations were issued in terms of Section 5 of the PPPFA. The PPPFA was promulgated to give effect to Section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in Section 217(2) of the Constitution:

5.1. Section 217 of the Constitution reads:

> *"(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a*

system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented." (Emphasis added)

5.2. Section 217(3) refers in particular to the procurement policy referred to in subsection (2), which procurement policy may provide for the advancement of persons or categories of persons disadvantaged by unfair discrimination. Section 217 is the starting point for an evaluation of a proper approach to an assessment of the Constitutional validity of outcomes under the State procurement process.

5.3. Any interpretation of the PPPFA must be construed against the background of the system envisaged by Section 217(1) of the Constitution, namely one which is "*fair, equitable, transparent, competitive and cost-effective*".

5.4. The framework for the implementation of the Preferential Procurement Policy contemplated in Section 217(2) is reflected in Section 2 of the PPPFA, reading:

"2. ***FRAMEWORK FOR IMPLEMENTATION OF PREFERENTIAL PROCUREMENT POLICY*** –

(1) An Organ of State must determine its preferential procurement policy and implement it within the following framework:

(a) a preference point system must be followed;

(b)

(i) For contracts with a rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;

(ii) For contracts with a rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;

(c) any other acceptable tenders which are higher in price must score fewer points, on a pro rata basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;

(d) the specific goals may include –

(i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;

(ii) implementing the programmes of the Reconstruction and Development Programme as

published in Government Gazette No 16085 dated 23 November 1994;

(e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;

(f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and

(g) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the Organ of State without prejudice to any other remedies the Organ of State may have.

(2) *Any goals contemplated in subsection (1)(e) must be measurable, quantifiable and monitored for compliance*."

(Emphasis added)

5.5. Section 2 of the PPPFA posits a two-stage enquiry:

5.5.1. the first step is to determine which tenderer scored the highest points in terms of the 90/10 or 80/20 points system;

5.5.2. the next stage is to determine whether objective criteria exist, in addition to or over and above those referred to in Sections (2)(d) and (e), which justify the award of a tender to a lower scoring tenderer.

5.6. A perusal of the PPPFA illustrates that, in principle, all suppliers are able to compete for Government contracts and preference plays a role only during the award stage of the procurement process.

THE REGULATIONS:

6.

6.1. In terms of Section 5 of the PPPFA Respondent may make Regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of the Act. Section 5(2) specifically stipulates that draft Regulations must be published for public comment in the Government Gazette and every Provincial Gazette before promulgation.

6.2. 2001 Regulations

6.2.1. Preferential Procurement Regulations were first adopted in 2001. The 2001 Regulations provided for a preference point system, allowing for 80 points to be allocated for price, and 20 points for being a Historically Disadvantaged Individual ("*HDI*") and/or subcontracting with an HDI and/or achieving any of several specified goals not limited to race reflected in Regulation 17. For tenders with a rand value above R500 000-00, 90 points were allowed for price, and 10 points for specific goals. In terms of Regulation 8 points for functionality were to be included in points for price, the combined points not to exceed 80 or 90 points depending upon the rand value of a tender above R500 000-00.

6.2.2. Regulation 8, which was patently *ulta vires* the stipulation of Section 2(1)(f) of the PPPFA, allowed for contracts to be awarded to a tenderer that did not score the highest number of points, on reasonable and justifiable grounds.

6.2.3. Gorvan J, in **Sizabonke Civils CC t/a Pilcon Propjects v Zululand District Municipality 2011 (4) SA 406 KZP** judged Regulation 8 in conflict with the PPPFA because points for functionality might in terms thereof be allocated within the 90/80 points required by the Act to be awarded for price alone. Regulations 8(2) to 8(7) were therefore declared inconsistent with Section 2(1)(b) of the PPPFA, and invalid.

6.3. 2011 Regulations

6.3.1. The 2001 Regulations were repealed by Regulation 15 of Preferential Procurement Regulations adopted on 8 June 2011. The 2011 Regulations also provided for a preference point system, but increased the threshold to distinguish between low value and high value tenders to R1 000 000-00.

6.3.2. Functionality was elevated to a substantial evaluation criterion, although State Organs were given a discretion to evaluate on functionality, or not.

6.4. 2017 Regulations

6.4.1. On 14 June 2016 Respondent published a notice in the Government Gazette, inviting public comment on draft Preferential Procurement Regulations with a final date for submission of comments not later than 15 July 2016;

6.4.2. The South African Institute of Race Relations submitted a comment on 15 July 2016, indicating *inter alia* that the period of communication was too short to meet the constitutional requirement for proper public consultation. Applicant similarly on 23 August 2016 requested a revision of the period allowed for public participation and asked for further 60 to 90 days to be allowed for further comments.

6.4.3. In terms of a notice published in the Government Gazette of 2 September 2016, of which Applicant was informed on 12 September 2016, the date for comment on the draft Regulations was extended to 23 September 2016, allowing effectively for a further 3 weeks for comment.

6.4.4. The 2017 Regulations were promulgated on 20 January 2017.

6.5. A comparison with the previous Procurement Regulations of 2001 and 2011, highlights the following features of the 2017 Regulations:

6.5.1. Pre-qualification criteria to allow the advancement of primarily selected black categories of people to tender for contracts by State Organs were introduced;

6.5.2. Functionality, within the discretion of a State Organ, was allowed, to qualify tenders as acceptable or not;

6.5.3. A preference point system for acquisition of goods and services was retained but the threshold to distinguish between low level and high-level contracts was increased to R50 000 000-00;

6.5.4. Organs of State are further required to identify tenders, where it is feasible to subcontract a minimum of 30 % of the value of the contract for contracts above R30 000 000-00 to primarily selected black categories of people (designated groups);

6.5.5. Notwithstanding the pre-qualification criteria and functionality dealt with as indicated, the content of Section 2(1)(f) of the PPPFA was incorporated in Regulation 11, allowing the award contract to a tenderer that did not score the highest points by application of objective criteria.

2017 REGULATIONS *ULTA VIRES* THE PPPFA:

7.

7.1. In terms of Section 2(1) of the PPPFA the first essential of a Preferential Procurement Policy and the implementation thereof is that a preference point system must be followed. As envisaged in Section 217(2) of the

Constitution, provision is made for the protection and advancement of persons, or categories of persons, disadvantaged by unfair discrimination by allowing for specific goals to be taken into account as part of the preference point system, the points to be allocated for such specific goals to be limited to 10 points for higher value contracts, and 20 points, for lower value contracts. In terms of Section 2(1)(d) the specific goals may include contracting with persons or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability. Disadvantaged persons on the basis of race, gender and disability can therefore, in terms of the PPPFA be preferred, by scoring respectively 10 or 20 additional points before price is taken into account.

7.2. Section 2(1)(f) of the PPPFA is clear that contracts must be awarded to tenderers who score the highest points. The rule is therefore that the highest point scorer must be awarded the contract. There is one exception to the rule, being that the award of a contract may be justified to a tenderer not scoring the highest points if there are "*objective criteria*" in addition to those contemplated in paragraphs (d) and (e). Section 2(1)(f) is cast in peremptory terms. The first step in determining to whom the contract must be awarded is accordingly to determine which tenderer has scored the highest points on the basis of points for price and for special goals, including historic unfair discrimination on the basis of race, gender and disability. The next step is to determine whether there are objective criteria, in addition to those contemplated in paragraphs (d) and (e), necessarily

implying objective criteria over and above to historic discrimination on grounds of race, gender or disability. Courts have interpreted the stipulations of the PPPFA accordingly, and the Court *a quo* were referred to several authorities in this regard. In the Rainbow Civils-matter, the following conclusion was reached:

> "*Nothing in the wording of the tender document, the Procurement Act or the Procurement Regulations, afforded the decisionmaker the discretion to attach any weight to race and gender over and above the 10 preference points available to be awarded for B-BBEE status. This is not surprising. To my mind the very purpose of the Procurement Act, and the relevant B-BBEE Codes of Good Practice, is to ensure that a Preferential Procurement Policy is formulated and implemented in a defined and consistent manner, and not left to vagaries of individual discretion*."

7.3. The legislature, through the PPPFA, seems to have afforded a very limited discretion to Organs of State with regard to the award of a contract to a bidder who does not score the highest points. Section 2(1)(f) of the Procurement Act is an exemption to the general rule, that is the award of a contract to the highest scoring bidder, and a restrictive interpretation should therefore be given to the phrase "*objective criteria in addition to those contemplated in paragraphs (d) and (e)*" of Section 2(1) of the PPPFA.

8.

8.1. The 2017 Regulations, more in particular Regulation 4 and Regulation 9 provide respectively for pre-qualification criteria which may be applied before determining the award of a tender on the preference point system, and the subcontracting for contracts above R30 000 000-00 to designated groups. The purpose of pre-qualifying criteria and subcontracting is to prefer "*designated groups*" above other tenderers. "Designated Group" is defined as:

"(a) Black designated groups;

(b) Black people;

(c) Woman;

(d) People with disabilities; or

(e) Small enterprises as defined in Section 1 of the National Small Enterprise Act, 1996."

8.2. The "*designated groups*" are more specifically described in Regulations 4 and 9:

8.2.1. In terms of the pre-qualification criteria in Regulation 4, a State Organ may limit tenderers to:

8.2.1.1. Tenderers having a stipulated minimum B-BBEE status level of contributor;

8.2.1.2. An EME or QSE;

8.2.1.3. A tenderer subcontracting a minimum of 30 % to an EME or QSE, or various specifically mentioned black owned EME's or QSE's.

8.2.2. In terms of Regulation 9, if feasible, subcontracting as a condition of tender may be required for contracts above R30 000 000-00 to:

8.2.2.1. An EME or QSE as such, or to various specifically mentioned black owned EME's or QSE's.

It is clear from the stipulations of Regulation 4 and Regulation 9 that, with the exception of possible EME's and QSE's not complying with the black owned requirements, the purpose of the Regulations is to prefer previously disadvantaged persons who suffered discrimination primarily because of race (provision is however also made for persons with disabilities and for woman as specific groups of specified EME's or QSE's which may be preferred by Regulation 4 of Regulation 9).

9.

9.1. It is submitted that the PPPFA, more in particular the framework as set out in Section 2, does not allow for "*qualifying criteria*" which may disqualify a potential tenderer from tendering for State contracts. Similarly the Constitution, in particular Section 217 does not allow for pre-qualification criteria which may exclude potential tenderers from bidding for State

contracts. The exclusion of tenderers who may be the most able entities who can provide services and/or goods at the lowest prices, is in direct conflict with the fundamental requirements that State procurement should be competitive and cost effective. In this regard it is submitted that the Court *a quo* erred in finding that before application of the framework as set out in Section 2 of the PPPFA, a State Organ may first apply pre-qualification criteria relating to previously disadvantage status of tenderers to determine whether a tender is an acceptable tender. "*Acceptable tender*" is defined in the PPPFA as "*any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document*". It was pointed out during argument in the application for leave to appeal with reference to **Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province, 2008 (2) SA 481 (SCA)** paragraph 18 that on a proper construction of "*acceptable tender*" reference is made to the form and content of the tender, as required, and not to the qualification of a tenderer. This aspect was not addressed in the judgment denying leave to appeal to Applicant.

9.2. Section 2 of the PPPFA leaves no doubt, as indicated above, and confirmed by Courts, that the procurement framework entails as a first step determination of which tenderer scores the highest points, and only thereafter determination whether objective criteria exist, which justify the award of the tender to a lower scoring tenderer. The 2017 Regulations put the horse before the cart, and allows that a group of tenderers who qualify

to tender, may first be determined according to *inter alia* race, gender and disability, and only thereafter for the preference point system to be applied.

9.3. Race, gender and disability, being specific goals which may allow an additional 10 or 20 points out of 100 during the preference point adjudication, can simply not be used to first establish a group of "*qualified*" tenderers, and thereafter again be taken into account as part of the preference point system. No interpretation of Section 2 of the PPPFA can render such a result. The implication of the PPPFA cannot be doubted: All potential tenderers may tender, and the award of the tender should be made to the highest points scorer, absent objective criteria justifying the award to a tenderer with a lower score.

9.4. Although Section 2(1)(d) of the PPPFA allows for "*specific goals*" to be taken into account as part of 10 or 20 points of the preference point system, those "*specific goals*" were actually reduced to the B-BBEE status level of tenderers. Respondent's motivation for issuing Regulation 4, as accepted by the Court a quo (erroneously, it is submitted), is that race, gender and disability can be taken into account as objective criteria in terms of Section 2(1)(f) of the PPPFA. It is submitted that Respondent is in this regard wrong, and the Court *a quo* erred:

9.4.1. The above interpretation ignores the words "*in addition to those contemplated in paragraphs (d) and (e)*" as part of Section 2(1)(f),

and

9.4.2. is in direct conflict with several authorities.

Moreover, the two-fold determination of tenders forming part of the framework enacted by the legislature, provides firstly for the establishment of the highest point scorer, and thereafter for consideration of objective criteria which may justify the award of the tender to a lower scorer. The framework does not allow for the preliminary disqualification of tenderers, without any consideration of the tender as such.

9.5. It follows from the aforegoing that Respondent overstepped the powers conferred upon him to make Regulations in accordance with the framework set out in Section 2 of the PPPFA when provision was made for pre-qualifying criteria and subcontracting as pre-condition for the award of a State contract. The stipulations of the 2017 Regulations which elevate race to a pre-qualification and to a preliminary objective criterion to allow State Organs not to consider a tender of a tenderer who may score the highest points in terms of the preference point system, are *ultra vires* the powers of Respondent and therefore void and invalid. The Minister resorted to law-making, so contradicting the separation of powers underpinned by the Constitution. The Constitution vests the capacity to make new law in Parliament, not in the Executive.

9.6. The 2017 Regulations made it impossible for competitors on lower B-BBEE levels, to compete with entities and suppliers on a higher level of B-BBEE, notwithstanding ability, cost effectiveness and functionality. Applicant contends that such curtailment of competition is in conflict of PPPFA. In this regard invitations to tender by State Organs where only bidders with a particular B-BBEE level were identified to tender were annexed to the Replying Affidavit filed by Applicant.

PROCEDURAL UNFAIRNESS:

10.

10.1. The 2017 Regulations are comprehensive, deal with contentious matters, and drastically differ from previous Regulations, not only by allowing for pre-qualifying conditions, but also by increasing the threshold to distinguish between low-level and high-level contracts from R1 000 000-00 to R50 000 000-00 (a 5 000 % increase). The effect of the increase of the threshold is of course to advance the interests of previously disadvantaged persons, who can in terms of the 2017 Regulations score 20 points founded upon B-BBEE compliance up to R50 000 000-00, where previously 20 points for B-BBEE compliance was allowed only for contracts up to R1 000 000-00.

10.2. Authorities clearly indicate that a distinction must be drawn between the merits of an administrative decision/sub-ordinate legislation, and the process of reaching it. Requirements of rationality and fairness in

procedure are at the heart of legality. Regulations on fair administrative actions, published under GN1022 in Government Gazette 23674 of 31 July 2002 requires a period of at least 30 days for comment after an invitation to members of the public to submit comments in connection with proposed administrative action. The closing date for comments specified may further be extended.

10.3. It was submitted to the Court *a quo* that:

10.3.1. an initial period of 30 days for public comment, extended effectively with a period of 3 weeks, undermined meaningful opportunity for public participation and involvement in making of the 2017 Regulations, taking into account the extent and impact of the Regulations. The nature of the Regulations and any urgency in the matter are relevant. The nature of the 2017 is far reaching and there appears to be no urgency in making the Regulations. The Regulations prescribed a procurement framework markedly different from the previous framework. It could therefore never have been justified to allow merely the minimum period for comment relating to the implementation of the principles. The implementation of the principles incorporated by the 2017 Regulations is of parament importance for the public, in particular business enterprises, and can therefore not be neglected. Hints by Respondent that too short notice did not cause any prejudice cannot avail Respondent. The question is not whether anyone has

actually been prejudiced, but whether the failure by Respondent to give sufficient opportunity for meaningful comment was calculated to prejudice potential objectors. Moreover where an irregularity is calculated to cause prejudice to a party, it is for the other party to show that the irregularity in fact caused no prejudice. Respondent has not shown that no prejudice has been or will be caused to Applicant's members, and the general public. Inherent in the extension of the initial period of 30 days for comment, was further an admission that the initial period was too short. The inference that the short period was calculated to prejudice potential objectors is therefore inevitable. The question then remains why only an effective further 15 days for comment were allowed.

10.3.2. one of the aspects to take into account when the reasonability of the period for comments is considered, is the impact of the Regulations upon the public.

10.3.3. the impact of the 2017 Regulations upon the public in general, and in particular in respect of suppliers of goods and services, cannot be under-estimated. It is difficult to postulate Regulations/ administrative action which may have a greater impact upon the public, in particular the business community. If the time period allowed for comment by Respondent *in casu* can serve as an indication of a reasonable opportunity for comment, a 30 day period should be reasonable in all other instances. This, surely, is not in accordance with a "*minimum period*" provided for by Regulations.

10.3.4. of importance is the adequacy or inadequacy, the sufficiency or insufficiency, of the period left to the public to exercise the right of comment upon the Regulations. There is of course no hard and fast rule which shows where to draw the line. The fact that 30 days is a minimum period prescribed for fair administrative action, is however an indication of an extreme beyond which an administrator may not ponder. The importance, the nature and impact of the 2017 Regulations require that Respondent could not simply have stuck to the minimum extreme, but he had at least to have granted a meaningful extension for commentary subsequent to the complaints relating to the time period allowed. Applicant requested a further period between 60 and 90 days for comments. The decision of Respondent to grant an extension for comments of 10 working days only, renders the procedure followed relating to the adoption of the 2017 Regulations unfair.

10.4. No explanation why the minimum period for public comment was allowed by Respondent was tendered. Moreover a "*retrospective*" extension of time was of no significance, because of the lack of any certainty of an extension during the period of retrospectivity. The extension for further comment during the period 2 September 2016, (when notice of the extension was given), to 23 September 2016 did not even comply with the prescribed minimum period for comment, and was of no significance, which was

confirmed by a table annexed to the Answering Affidavit, which reflected not more than four responses received by Respondent after 2 September 2016.

10.5. In consideration of the aforegoing, it is submitted that the period allowed for public comment by Respondent was inadequate, which rendered the procedure followed for the adoption of 2017 Regulations unfair. The Court *a quo* consequently erred in finding that the adoption of the 2017 Regulations followed upon a fair and responsible process.

IRRATIONAL, UNFAIR AND UNREASONABLE REGULATIONS:

11.

Indications of irrationality, unfairness and unreasonableness relating to the 2017 Regulations are revealed by the *ultra vires* adoption of the 2017 Regulations and the unfair procedure followed in the adoption. The simple truth is that administrative action can only be rational and fair if taken within powers conferred upon the administrator, and in accordance with mandating legislation. Action by an administrator beyond powers conferred upon him by law is illegal, and consequently irrational. Apart from the discussion above, there are however other indications of irrational, unfair and unreasonable adoption of the 2017 Regulations:

11.1. The importance of the socio-economic impact of the 2017 Regulations stands beyond argument. Rational and reasonable action would therefore have been to conduct a proper socio-economic impact investigation before

adoption of the Regulations, and even before public comment was asked, to facilitate comments relating to the impact assessment. That would have been in accordance with a cabinet decision, requiring an initial and final impact assessment to be attached to Regulations when gazetted for public comment. The Court *a quo* was referred to the Socio-Economic Impact Assessment System ("*SEIAS*") Guidelines which apply to new Regulations, but were not applied by Respondent. Respondent explained non-compliance by stating that compliance with SEIAS was not compulsory. It is submitted that non-compliance with SEIAS indicates that a fair procedure in the adoption of the 2017 Regulations was not followed, and that the adoption of 2017 Regulations was irrational and unfair.

11.2. It cannot be gainsaid that the predominant motive behind the 2017 Regulations was the advancement of interests of previously disadvantaged people, because of historical discrimination against them. This primarily concerns black people. As indicated, Respondent could not attach any weight to race and gender over and above the 10 or 20 preference points available to be awarded for B-BBEE status. Respondent, when adopting the 2017 Regulations, however advanced B-BBEE objectives, although those objectives are not part of the five basic principles stipulated for procurement by Section 217(1) of the Constitution. In the circumstances the following which was said in the Rainbow Civils-matter is true of the adoption of the Regulations:

> *"I therefore consider that the decision-maker's decision was materially influenced by an error of law, as contemplated in section 6(2)(b) of PAJA, in that he wrongly considered himself at liberty to take into account the objectives set out in section 2(d) of the B-BBEE Act, and failed to appreciate the limited ambit of his powers*."

The adoption of procurement Regulations to further the objectives of B-BBEE was with respect irrational, unreasonable and unfair.

11.3. "*Functionality*" is defined in Regulation 1 of the 2017 Regulations as "*the ability of a tenderer to provide goods or services in accordance with specifications as set out in the tender documents*". It is conspicuous that, in terms of the definition, functionality relates to the provision of goods and services, and not only to services, as was contended by Respondent.

11.4. It is significant that Respondent himself referred in the Answering Affidavit to functionality with reference to the 2011 Regulations as a "*gatekeeper*" or "*threshold requirement*". Respondent also remarked that the award of a tender to a tenderer with functionality absent, would be irrational. It is submitted that the importance of functionality as a determinative consideration for the award of a tender, cannot, and was not denied. Yet in terms of the 2017 Regulations:

11.4.1. the evaluation of tenders on functionality is left in the discretion of State Organs;

11.4.2. the qualification criteria are to be considered, before functionality;

11.4.3. the application of pre-qualification criteria may render the most able (functional) tenderer incapable of tendering; and

11.4.4. in case of a deadlock where two or more tenderers score an equal total number of points, the deadlock breaking-mechanism is to first award the tender to the tenderer that scored the highest points for B-BBEE, and only if unsuccessful, functionality will come in play.

11.5. It is clear that functionality may be taken into account as an objective criterion in terms of Section 2(1)(f) of the PPPFA, as was confirmed by authorities. There can however be no justification for the minor role allocated to functionality in the 2017 Regulations. It is submitted that the function to be fulfilled by functionality in terms of the 2017 Regulations, if any, is inappropriate, and renders the 2017 Regulations irrational, unreasonable and unfair.

11.6. The increase in the threshold to distinguish between low level contracts and high level contracts, can only be motivated by an intention to further advance the interest of previously disadvantaged people. Respondent again acted for an ulterior B-BBEE purpose, and indirectly circumvented the value to be allocated to PDI-status in terms of Section 2(1)(d) of the PPPFA. No justification for the abnormal increase in the threshold was given in the Answering Affidavit. It is submitted that the increase was irrational, unfair and unreasonable.

12.

In consideration of the aforegoing, it is submitted that the Court a quo erred not to find the 2017 Regulations irrational, unfair and unreasonable. It is submitted that a proper case for the review and setting aside of the 2017 Regulations was made out by Applicant. The impugned Regulations are in conflict with the PPPFA, and are, as a result, invalid. The breach of the principle of legality further justified a declaration that the 2017 Regulations are invalid. Consequently it is submitted that the Court *a quo* erred not to grant the relief set out in the Notice of Motion to the Applicant, the pertinent part of which read:

> "*1. That the promulgation and adoption of the Preferential Procurement Regulations, 2017 by the Respondent is reviewed and set aside;*
> *2. That the adoption of the Preferential Procurement Regulations, 2017 be declared invalid;*
> *3. That the Respondent be ordered to pay the costs of the application*."

_____

DEPONENT

SIGNED and SWORN to at _____ on this _____ day of _____ 2019 by the Deponent who stated that:

1. He knows and understands the contents of the declaration; and
2. He has no objection to taking the prescribed oath; and
3. He considers the prescribed oath as binding on his conscience;

And Government Notice Regulation 1258 as amended by the Government Notice Regulation 1648, Government Notice Regulation 1428 and Government Notice Regulation 773 was fully complied with.

_____

COMMISSIONER OF OATH

FULL NAMES:

BUSINESS ADDRESS:

AREA:

DESIGNATION: